

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

4 | Dominic R. Malone, et al.,

Case No. 2:24-cv-00745-CDS-BNW

## Plaintiffs

## Order Denying Application to Proceed in forma Pauperis and Denying Motion for Class Certification

V.

7 | Heather Baca-Cook, et al.,

[ECF Nos. 1, 1-3]

## Defendants

10 Nevada Department of Corrections (NDOC) inmate Domonic Ronaldo Malone, #69418,  
11 has submitted a pro se civil rights complaint under 42 U.S.C. § 1983 and applied to proceed *in*  
12 *forma pauperis*. ECF Nos. 1-1, 1. Malone also filed a motion for class certification under Federal Rule  
13 of Civil Procedure 23. ECF No. 1-3. I note that Delbert Greene and Jamal Johnson are identified as  
14 plaintiffs in the complaint. ECF No. 1-1 at 1. According to the NDOC inmate database, Greene is  
15 currently housed at High Desert State Prison (HDSP), but Johnson is no longer incarcerated. The  
16 court does not have Johnson's current address.

17 For the reasons discussed below, I find that Malone has amassed over three strikes under  
18 the Prison Litigation Reform Act (PLRA). Because the complaint does not plausibly allege that  
19 Malone faced an ongoing danger of serious physical injury when he filed it, he cannot proceed *in*  
20 *forma pauperis* in this action. I therefore deny Malone's *in forma pauperis* application and grant him an  
21 extension of time to pay the full \$405 filing fee if he wants to proceed with this action. And I  
22 dismiss plaintiffs Greene and Johnson from this action without prejudice to each plaintiff's ability  
23 to file his own signed complaint, under a new case number, and either pay the required filing fee  
24 or apply for *in forma pauperis* status.

25 I. Filing fee

The PLRA provides that no prisoner may “bring a civil action or appeal a judgment in a civil action or proceeding” under *informa pauperis* status “if [he] has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United

1 States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim  
 2 upon which relief may be granted, unless the prisoner is under imminent danger of serious  
 3 physical injury.” 28 U.S.C. § 1915(g). The Ninth Circuit explained in *Andrews v. Cervantes* that the  
 4 exception to § 1915(g) applies only if the prisoner makes a plausible allegation that he or she faced  
 5 “an ongoing danger” of serious physical injury “at the time the complaint was filed.” 493 F.3d 1047,  
 6 1055–56 (9th Cir. 2007). “The prisoner may meet this requirement by ‘alleging that prison officials  
 7 continue with a practice that has injured him or others similarly situated in the past,’ or that there  
 8 is a continuing effect resulting from such a practice.” *Williams v. Paramo*, 775 F.3d 1182, 1190 (9th  
 9 Cir. 2015) (cleaned up) (quoting *Andrews*, 493 F.3d at 1057). If the prisoner satisfies the exception,  
 10 it applies to the entire complaint, not on a claim-by-claim basis or only for certain types of relief.  
 11 *Andrews*, 493 F.3d at 1052.

12           **A. Malone has amassed at least three strikes under the PLRA.**

13           Malone commenced this civil-rights action on April 17, 2024. ECF No. 1. On October 15,  
 14 2018, Malone commenced the civil-rights action styled *Malone v. Dzurenda*, Case No. 2:18-cv-01994-  
 15 JAD-NJK (D. Nev.) (*Malone I*), while he was incarcerated at HDSP. *Malone I*, ECF Nos. 1 at 3; 1-1 at  
 16 1. The district court dismissed Malone’s complaint for failing to state a claim upon which relief  
 17 could be granted, and granted him leave to file an amended complaint if he could cure the stated  
 18 defects. *Id.* at ECF No. 4. On December 12, 2019, when Malone failed to file an amended complaint  
 19 by the deadline, the district court dismissed the action. *Id.* at ECF No. 5. This constitutes Malone’s  
 20 first strike under the PLRA. See *Harris v. Mangum*, 863 F.3d 1133, 1143 (9th Cir. 2017) (“[H]old[ing]  
 21 that when (1) a district court dismisses a complaint on the ground that it fails to state a claim,  
 22 (2) the court grants leave to amend, and (3) the plaintiff then fails to file an amended complaint,  
 23 the dismissal counts as a strike under § 1915(g).”).

24           On March 11, 2020, Malone commenced the civil-rights action styled *Malone v. Nev. Dep’t of*  
 25 *Corr.*, Case No. 2:20-cv-00504-GMN-EJY (D. Nev.) (*Malone II*), while he was incarcerated at  
 26 HDSP. *Malone II*, ECF Nos. 1 at 3, 1-1 at 1. The district court dismissed Malone’s complaint for  
 27 failing to state a claim upon which relief could be granted, and granted him leave to file an  
 28 amended complaint if he could cure the stated defects. *Id.* at ECF No. 6. Malone filed an amended

1 complaint, which the district court dismissed on May 14, 2021, for failing to state a claim upon  
 2 which relief could be granted. *Id.* at ECF No. 9. This constitutes Malone's second strike under the  
 3 PLRA. *See Harris*, 863 F.3d at 1143.

4 Malone appealed the dismissal order in *Malone II* to the Ninth Circuit Court of Appeals.  
 5 *Malone II*, at ECF No. 12. On March 17, 2022, the appellate court dismissed Malone's appeal as  
 6 "frivolous." *Id.* at ECF Nos. 16, 17 (regarding Appeal No. 21-15944). This constitutes Malone's third  
 7 strike under the PLRA.

8 On February 10, 2023, Malone commenced the civil-rights action styled *Malone v. State of*  
 9 *Nevada*, Case No. 2:23-cv-00217-APG-NJK (D. Nev.) (*Malone III*), while he was incarcerated at  
 10 HDSP. *Malone III*, at ECF Nos. 1-1 at 1; 3 at 3. The district court dismissed the complaint for failing  
 11 to state a claim upon which relief could be granted, noting that Malone's claims were barred by  
 12 *Heck v. Humphrey*, 512 U.S. 477 (1994), as he sought to have his sentence vacated and be released  
 13 from custody. *Id.* at ECF No. 9. The district court granted Malone leave to file an amended  
 14 complaint if he could articulate a claim that was not barred by *Heck*. *Id.* at 5. On June 12, 2023,  
 15 when Malone failed to file an amended complaint, the district court dismissed the action for,  
 16 among other things, failure to state a claim upon which relief could be granted. *Id.* at ECF No. 11.  
 17 This constitutes Malone's fourth strike under the PLRA. *See Washington v. Los Angeles Cnty. Sheriff's*  
 18 *Dep't*, 833 F.3d 1048 (9th Cir. 2016) (holding that "Heck dismissals may constitute Rule 12(b)(6)  
 19 dismissals for failure to state a claim"—and thus a strike under the PLRA—"when the pleadings  
 20 present an 'obvious bar to securing relief' under *Heck*").

21       **B. Malone's complaint does not satisfy § 1915(g)'s exception.**

22 As outlined above, on more than three occasions before Malone initiated this action,  
 23 federal courts have dismissed civil actions and appeals that Malone commenced while he was  
 24 detained or incarcerated because the proceedings were frivolous or failed to state a claim upon  
 25 which relief could be granted. So to be granted *in forma pauperis* status and proceed in this action  
 26 without prepaying the full \$405 filing fee, Malone's complaint must plausibly allege that he faced  
 27 "imminent danger of serious physical injury" when he filed it. 28 U.S.C. § 1915(g).

1           The complaint alleges that Malone was falsely charged with disciplinary violations for  
 2 entering segregated housing units without permission, denied due process during the subsequent  
 3 disciplinary proceedings, and was convicted of the charges and sanctioned, among other things,  
 4 by losing his job as a clerk in the prison's law library. ECF No. 1-1. The complaint also alleges that  
 5 Malone was treated differently from other inmates in the disciplinary proceeding because he is  
 6 Black. *Id.* But there are no factual allegations that Malone faced "an ongoing danger" of "serious  
 7 physical injury" when he filed the complaint. Because the complaint does not satisfy § 1915(g)'s  
 8 imminent-danger exception, Malone must pre-pay the full \$405 filing fee if he wants to proceed  
 9 with this civil-rights action. Malone's application to proceed *in forma pauperis* is therefore denied.

10 **II.       Greene, Johnson, and the motion for class certification**

11           Litigants who are not represented by counsel are pro se and have the right to plead and  
 12 conduct their own cases personally. 28 U.S.C. § 1654. But pro se litigants have no authority to  
 13 represent anyone other than themselves. *See, e.g., Simon v. Hartford Life, Inc.*, 546 F.3d 661, 664–65  
 14 (9th Cir. 2008) (collecting cases and explaining that a non-attorney plaintiff cannot pursue  
 15 claims on behalf of others in a representative capacity); *Cato v. United States*, 70 F.3d 1103, 1105 n.1  
 16 (9th Cir. 1995), superseded on other grounds by 28 U.S.C. § 1915(e); *C.E. Pope Equity Trust v. United States*,  
 17 818 F.2d 696, 697 (9th Cir. 1987). This means pro se litigants cannot seek to certify a case as a class  
 18 action themselves; they must be represented by counsel. *See Simon*, 546 F.3d at 665 (citing *Oxendine*  
 19 v. *Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975) (holding a pro se prisoner may not bring a class  
 20 action on behalf of fellow prisoners)). "Generally, a person has no right to counsel in civil actions."  
*Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (citing *Storseth v. Spellman*, 654 F.2d 1349, 1353  
 22 (9th Cir. 1981)). "However, a court may under 'exceptional circumstances' appoint counsel for  
 23 civil litigants [under] 28 U.S.C. § 1915(e)(1)." *Id.*

24           In any event, "[a] civil action is commenced by filing a complaint with the court." Fed. R.  
 25 Civ. P. 3. Nevada Local Rule LSR 2-1 provides that "[a] civil-rights complaint filed by a person  
 26 who is not represented by an attorney must be submitted on the form provided by this court or  
 27 must be legible and contain substantially all the information called for by the court's form." And  
 28 the complaint must be signed personally by the unrepresented party. Fed. R. Civ. P. 11(a).

1           Malone cannot bring claims on behalf of others like Johnson or Greene, including in a  
2 representative capacity using Rule 23's class-action device, because he is a pro se litigant not an  
3 attorney. The motion for class certification is therefore denied. Although the complaint's caption  
4 states that it is brought by Malone, Johnson, and Greene, that pleading is signed by only Malone.  
5 ECF Nos. 1-1 at 14; ECF No. 1-3 at 5. And neither Greene nor Johnson has paid the full \$405 filing  
6 fee in this action or applied to proceed *in forma pauperis*.

7           Considering that Malone has three strikes under the PLRA and is the only plaintiff who  
8 signed the complaint, I dismiss Johnson and Greene from this action without prejudice. This  
9 means only Malone is permitted to proceed in this action currently. If any other plaintiff wishes to  
10 proceed with his claims, he must file a signed complaint with the court, under a new case number,  
11 and either pay the full \$405 filing fee or file a fully complete application to proceed *in forma*  
12 *pauperis*.

13 **III. Conclusion**

14           It is therefore ordered that Malone's application to proceed *in forma pauperis* [ECF No. 1]  
15 is denied because that state prisoner has three strikes under the PLRA, and the complaint does  
16 not satisfy 28 U.S.C. § 1915(g)'s imminent danger exception.

17           It is further ordered that this action will be dismissed without prejudice unless Malone  
18 pays the full \$405 filing fee by August 12, 2024.

19           It is further ordered that the motion for class certification [ECF No. 1-3] is denied.

20           It is further ordered that plaintiffs Delbert Greene and Jamal Johnson are dismissed  
21 without prejudice from this action.

22           It is further ordered that if either Delbert Greene or Jamal Johnson wishes to proceed  
23 with his claims, each person must file his own complaint with the court, under a new case  
24 number, and either pay the full \$405 filing fee or file a fully complete application to proceed *in*  
25 *forma pauperis*.

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1 The Clerk of the Court is directed to send Delbert Greene courtesy copies of the  
2 approved form for filing a 42 U.S.C. § 1983 complaint and instructions for the same, the approved  
3 form application to proceed *in forma pauperis* for an inmate and instructions for the same, the  
4 complaint (ECF No. 1-1), and General Order No. 2021-05 by sending the same to HDSP's law  
5 library.

Dated: July 11, 2024

Cristina D. Silva  
United States District Judge